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NO. 80-120

In The

Supreme Court of the United States

October Term, 1980

ST. MARTIN EVANGELICAL LUTHERAN CHURCH *et al.*,

Petitioners,

vs.

STATE OF SOUTH DAKOTA.

On Petition for a Writ of Certiorari to the Supreme Court of South Dakota

MOTION OF GRACE BAPTIST TEMPLE, PRATTVILLE, ALABAMA AND THE ALABAMA CHRISTIAN EDUCATION ASSOCIATION, INC. FOR LEAVE TO FILE BRIEF AS AMICI CURIAE AND BRIEF OF GRACE BAPTIST TEMPLE, PRATTVILLE, ALABAMA AND THE ALABAMA CHRISTIAN EDUCATION ASSOCIATION, INC. AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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Pursuant to Rules 36 and 42 of the Rules of the Supreme Court of the United States, Grace Baptist Temple, Prattville, Alabama (hereinafter "Grace") and the Alabama Christian Education Association, Inc. (hereinafter ACEA) hereby move for leave to file the attached amicus curiae brief in support of the Petitioners herein.[1] In support of this motion, applicants show to the Court the following as to their interest and facts or questions of law that have not or will not adequately be presented by the parties.

1 Consent to applicants' participation has been granted by Petitioners but was denied by Respondent.

ACEA is a non-profit corporation formed to inform, represent, and to protect fundamental churches in their educational ministries in the State of Alabama. Its membership consists of 74 churches. Grace Baptist Temple is a non-profit corporation located in Prattville, Alabama, and a member of ACEA.

Grace and the members of ACEA are churches located in the State of Alabama. They are fundamental churches which believe in and obey the Bible as the inspired and inerrant Word of God. They are predominantly independent Baptist churches, although several other denominations are included. As to the issues presented to the Court herein, their beliefs and practices are identical in all material respects.

Grace and the members of ACEA operate many "ministeries", i. e., activities of their churches which have as their sole purpose some biblical objective. Among these ministries are Christian schools. The Christian schools are entirely religious in scope, being motivated by religious considerations and maintained solely to accomplish religious objectives. All of the activities in said Christian schools are conducted from a biblical Christian perspective.

None of the schools are separately incorporated or otherwise separate legal entities. All persons employed to work in the school ministries are employed by the respective churches. They are church staff.

Grace and ACEA have participated in other litigation involving issues similar to those presented to the Court herein. They obtained a permanent injunction against collection of unemployment taxes from churches by the Alabama Department of Industrial Relations. *See Alexander City Baptist Tabernacle, et al. v. Alabama,* No. CV-78-1482-T (Cir. Ct. November 8, 1979). Grace and

ACEA (through its members) also filed an amicus curiae brief in federal appellate proceedings involving similar issues, *See Alabama v. Marshall,* 626 F. 2d 366 (5th Cir. 1980) after having participated as an "interested party" (the approximate equivalent of amicus curiae) in the administrative proceedings that were reviewed therein.

The litigation in the Alabama state court and the Fifth Circuit resulted in decisions favorable to Grace and ACEA. The decision by the Supreme Court of South Dakota and the position asserted by the Respondent herein are to the contrary. Should this Court affirm the ruling of the Supreme Court of South Dakota, the affect will be to overrule or reverse precedents in which applicants have participated on the prevailing side.

The position of applicants involves another argument not yet thoroughly addressed by the parties or the courts in the instant case. Applicants hold that the educational process in their Christian schools *is* the exercise of religion (not merely that the education and religion are closely intertwined). Applicants would show that the educational process is inherently religious and that religious doctrine is being taught, spiritual culture is being instilled and faith is being exercised in every academic course. Applicants' schools are weekday activities of their churches. They are not closely related to the churches. They are the churches.

Finally, the applicants herein hold a firm religious conviction that they cannot pay taxes out of church funds which are designated for expenditure for biblical purposes. They believe that to do so would be a sin. Imposing a tax on the church with respect to its employees would force applicants to choose between obedience to God, whom they dare not disobey and obedience to Caesar.

Should the position of South Dakota and the United States Secretary of Labor be upheld, applicants will be subjected to tax levies, forced sales of church (not school) property and other drastic proceedings which would follow in the wake of their refusal to render unto Caesar a tax from the church treasury. For these reasons, applicants respectfully request that the Court grant permission to file the attached amicus curiae brief.

Respectfully submitted,

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PRELIMINARY STATEMENT

Applicants seek to file this amicus curiae brief with the consent of counsel for the Petitioners. Consent was sought from but denied by counsel for the State of South Dakota, Respondent. This brief supports the position of Petitioners. Hereinafter, the designations "J. A." and "P. A." followed by numbers, denote references to pages of the joint appendix and the appendix to the petition for writ of certiorari, respectively.

SUMMARY OF ARGUMENT

The State of South Dakota errs when it interprets 26 U. S. C. § 3309 and South Dakota Compiled Laws Ann.

§ 61-1-10.4 to require unemployment taxation coverage for church-school employees who are in the employ of a church or an organization operated primarily for religious purposes and operated, supervised, controlled or principally supported by a church or convention or association of churches.[1] Such an interpretation is inconsistent with the statutory language of both acts.

If South Dakota's interpretation were correct, it would result in violation of the First Amendment of the United States Constitution, because the State would be hindering the free exercise of religion in an overly burdensome way and in the absence of a compelling interest. It would also violate the establishment clause which prohibits excessive entanglement between church and government and excessive regulatory controls which stifle or inhibit religion.

ARGUMENT

1. Properly interpreted, neither Federal nor South Dakota law require unemployment taxation coverage for persons who are in the employ of a church or an organization which is operated primarily for religious purposes and which is operated, supervised, controlled or principally supported by a church or convention or association of churches.

The language of the pertinent South Dakota statute, S. D. Compiled Laws Ann. § 61-1-10.4 is virtually identical to that of the pertinent Federal statute, 26 U. S. C. § 3309, the Federal Unemployment Tax Act (FUTA).[2] The

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1 Organizations which are "operated primarily for religious purposes and which [are] operated, supervised, controlled or principally supported by a church or convention or association of churches" will hereinafter be called "religious purpose church organizations."

2 The federal law and the state statute will hereinafter sometimes be referred to collectively as "the subject statutes".

former was enacted by South Dakota in order to conform with the latter. The Supreme Court of South Dakota interpreted Section 3309 of FUTA in order to ascertain the proper construction of the corresponding South Dakota statute. *See In re Northwestern Lutheran Academy,* 290 N. W. 2d 845 (S. D. 1980). Therefore, this Court is presented initially with a question of interpretation of 26 U. S. C. § 3309.

(A) The plain language of the subject statutes excludes from coverage employment by persons in the employ of a church or a religious purpose church organization.

It is basic to statutory construction that when the wording of a statute is clear, the meaning ascribed to the statute is the meaning of the words used. *TVA v. Hill,* 437 U. S. 153, 173 (1978). The language of the South Dakota statute provides in SDCL 61-1-10.4 that the term "employment" shall not include services performed:

> (1) in the employ of (a) a church or convention or association of churches, or (b) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled or principally supported by a church or convention or association of churches; . . .

This language conforms to Section 3309 of FUTA. Under this language, to determine whether a particular employment is covered, one looks to the nature of the employer. Thus, the question is simply, whether a person is in the employ of a church or a religious purpose church organization. Nowhere does the statute say to look to the duties performed by the employee.

Notwithstanding the statutory language, under the interpretation espoused by South Dakota and the United States Department of Labor (USDOL), we must separate "strictly church duties" from other duties in the

church school. To determine whether a tax is due with respect to particular employees, we are told to examine their duties inasmuch as only the "strictly church duties" are excluded from the tax (JA 42). But this construction ignores the language of the statutes. Nowhere with respect to these exclusions do the statutes say to look to the duties of the employees in determining the tax liability.

Suppose a hypothetical inquiry as to whether coverage exists. Consider a church secretary and a legal secretary. There would be no point in asking about their duties. A church secretary does basically the same things as any other secretary: typing, opening mail, filing, answering the telephone, etc. To inquire about job duties for purposes of the statutes under consideration, is irrelevant. Rather, the important question is "who or what is the employer?" The secretary who is "in the employ of" a lawfirm is covered and unemployment compensation must be paid with respect to his or her salary. The secretary who is "in the employ of a church" is not covered and the tax cannot be required as to his or her salary. Likewise, a teacher in a church-school performs basically the same functions as a teacher in non-church school: They both teach children to read and write, they teach children how to think, how to do mathematical computations, how to behave socially, what morals they should have or what their values should be, the origin and destiny of the human race, etc. The teacher "in the employ of" a private non-religious school or a public school is covered. The teacher in a church-school, who is "in the employ of a church" or "in the employ of" a religious purpose church organization is excluded and the tax cannot be required as to his or her salary.

There can be no doubt that the persons employed in St. Martin Evangelical Lutheran School are "in the employ

of a church". Likewise, it is beyond doubt that persons employed at Northwestern Lutheran Academy are "in the employ of" a religious purpose church organization (P. A. 25, 31-33). The inquiry need go no further. The employees working in both schools are excluded from the tax under the language of the subject statutes.[3]

In reviewing the same statutory language, another court has held that such employees are excluded and that "it is not the responsibility or function of this court to perform linguistic gymnastics in order to upset the plain language of Congress as it exists today". *Alabama v. Marshall,* 626 F. 2d 366 (5th Cir. 1980). In holding otherwise, the Supreme Court of South Dakota has erred.

(B) In the absence of a clear legislative mandate, it is error to construe the subject statutes so as to raise serious constitutional questions.

In a recent case this Court considered the National Labor Relations Board assertion that it could exercise jurisdiction over religious schools. *NLRB v. Catholic Bishop of Chicago,* 440 U. S. 490 (1979). The NLRB had ruled that it had such jurisdiction. The United States Court of Appeals for the Seventh Circuit denied enforcement of the board's orders, ruling that extension of jurisdiction over religious schools by the NLRB would violate the First Amendment of the United States Constitution. *Catholic Bishop of Chicago v. NLRB,* 559 F. 2d 1112 (7th Cir. 1977). Upon review, this Court affirmed the decision of the Seventh Circuit. The Court examined the legislative history of the National Labor Relations Act. It un-

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3 Although there is no need to delve into the legislative history, amici join in arguments made elsewhere and preserved in the record herein to the effect that the legislative history shows no indication of Congressional intent to require coverage for employees of churches or religious purpose church organizations.

dertook that approach because it concluded at 440 U. S. 501 that:

> [I]t is incumbent on us to determine whether the Board's exercise of its jurisdiction here would give rise to serious constitutional questions. If so, we must first identify "the affirmative intention of the Congress clearly expressed" before concluding that the Act grants jurisdiction.

The Court observed that not only could the conclusions of the Board infringe upon the First Amendment rights, "but the very process of inquiry", could do so. The Court further noted that "[t]here is no clear expression of an affirmative intention of Congress that teachers in church-operated schools should be covered by the Act". 440 U. S. at 504. The Court held then that the National Labor Relations Act must be construed as not permitting the NLRB to exert jurisdiction over religious schools because a contrary construction would give rise to serious constitutional questions.

In the instant case, there is no expression whatsoever, much less a clear expression, that the Congress intended to extend unemployment taxation to employees of churches or religious purpose church organizations whose duties include teaching. In the absence of such an affirmative intention, clearly expressed by Congress, it would be error to conclude that the subject statutes require extension of unemployment taxation to Petitioners.

2. If the South Dakota statute has the meaning asserted for it by the respondent, then it is unconstitutional under the First Amendment of the United States Constitution.

(A) The interpretation contended for by the State of South Dakota hinders and burdens petitioners in the exercise of religion.

In analysis of a First Amendment free exercise question, this Court has set forth the standards to be observed in several previous cases. In *Sherbert v. Verner,* the Court said that the first question is whether the statutory requirement "imposes any burden on the free exercise of . . . religion." *Sherbert v. Verner,* 374 U. S. 398, 403 (1963). The burden on religion need not be direct, but rather, may be indirect. As stated by the Court:

> For if the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate inviduously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect.

Sherbert v. Verner, supra at 404.

South Dakota's interpretation of the subject statutes hinders and threatens the observance of Petitioners' (and Amici's) religion in many ways. Most obvious is the financial burden. SDCL § 61-5-15. The law provides that contributions must be paid by the employer and in no respect can they be deducted from the wages of the employee. On this point, the Supreme Court of South Dakota cited *Braunfield v. Brown,* 366 U. S. 599 (1961) for the proposition that a law is not unconstitutional on free exercise grounds merely because it operates "so as to make the practice of . . . religious beliefs more expensive." However, *Braunfield* is inapposite. That case involved Orthodox Jews who contended that application of Sunday closing laws to their businesses was unconstitutional because their faith required that their businesses be closed from Friday evening to Saturday evening. Thus, they asserted that they were put at an unfair disadvantage. Because their faith required that they close on Saturday, when most establishments were open, they argued that they should be able to stay open on Sunday when most

establishments were closed. It was in that context that the Court observed that a statute will not be stricken on free exercise grounds merely because it makes the practice of religious beliefs more expensive. The Orthodox Jews were not forced to work on a day upon which their faith required rest. Nor were they required to rest on a day upon which their faith required work. Rather, they were not allowed by the law to work on a day on which their faith *allowed* them to work. There was no direct financial burden imposed. No tax was imposed upon them for working on Sunday, or for not working on Saturday. No direct financial outlay was forced upon them. Rather, because of their *faith,* they did not work on Saturday—a day when the law would have allowed them to work. But the law did not infringe directly on their faith by prohibiting work on Sunday. Thus, the rationale of *Braunfield v. Brown, supra,* is inapposite to the instant case where Petitioners are purportedly subjected to a direct financial burden in the form of a tax upon their religious activity, the operation of a religious school.

The subject statutes impose other burdens. For instance, an employee can be disqualified for benefits if he left his work "voluntarily without good cause" under SDCL § 61-6-13 or if he were discharged for "misconduct connected with his work" under SDCL § 61-6-14. When there is reason to believe that an employee is disqualified for benefits, the former employer is made a party to the department's proceeding (in obvious recognition of the fact that the former employer has a stake, i. e., something to lose). SDCL § 61-7-3. An employer's account is charged when his former employees receive benefits and this can result in an increased liability to the employer. *See* SDCL §§ 61-5-17, 61-5-18, 61-5-28, 61-5-29 and 61-7-3. Thus, in a

particular case it might well be to the employer's (i. e., church's or synod's) interest to show that an employee voluntarily left his job "without good cause" or that the employee was terminated "for misconduct". In such instances the interests of the employer and the employee would be adverse and the government would be put in the role of determining who was correct.

Here the mission or purpose for the church school becomes relevant. At St. Martin Evangelical Lutheran School, not unlike the typical church school, the education process is regarded by the Church and its members as religious. It necessarily deals with questions which are ultimately religious in tone. It is impossible to have complete education without dealing with God in some way. Hence, the "academic" subjects are taught from a Christian perspective. It is believed that the Bible requires a Christian education, i. e., a biblical education in which children are trained "in the nurture and admonition of the Lord." This requirement stems from the Bible and is a part of the faith of the church and the families involved in church-schools. In sending their children to church-schools, the parents and church staff are not performing a "secular" function. In sending their children to church-schools, the parents and church staff are practicing their faith.

The church school activities are supported financially by the church. They are staffed by church staff. They are governed by the church governing bodies. They receive no government aid. Prayer, scripture and Bible study have a place in every subject or activity. In every respect the school is an integral part or facet of the church and not a separate undertaking or enterprise. For the state of South Dakota to say to such a church "persons employed in your school are now subject to unemployment

taxation" is the equivalent of saying to it "persons employed in your Sunday School are now subject to unemployment taxation".

Similarly, the Northwestern Lutheran Academy is established out of religious motivation, the training of pastors. The scope of the undertaking in the Academy is not less "religious" than in St. Martin Evangelical Lutheran School.

It is readily apparent that the church school or the pastoral training academy are not established merely to impart academic knowledge. They are designed to indoctrinate the students in a set of values which are to govern the students throughout their lives. In this context, it is obvious that the church staff (i. e., the teachers) must uphold consistent standards at all times, even when "off duty", if credibility is to be maintained.

Here is where infringement will surely occur. There will be instances where "off duty" conduct by an employee would be sufficient cause to terminate him from church employment, because of the *religious* duty to be exemplary in inculcating Christian values. Often such conduct would not be labelled "misconduct" by persons of different beliefs. This will cause situations where the Secretary will be second guessing the church's religious authority over its employees. For instance, suppose an employee is terminated because it is learned that he is unmarried, but living with a member of the opposite sex. Or suppose an employee is terminated because he is seen, off duty, drinking beer. The former is acceptable to a large segment of society, the latter to most of society. Either of these might be cause to fire him from a Christian school. Yet the Secretary would be forced to decide whether the employee was discharged "for misconduct connected with his work."

The possibilities of conflict are manifest. Is such activity "misconduct"? Is it "connected with work" if it occurs on Friday evening? Is it "connected with work" if no student observes it? Is it "misconduct" if done without knowledge of a specific rule prohibiting it? If done "in good faith"? If the church's goal in having its Christian school is to instill basic religious morals, attitudes and lifestyles, may the church, in the interest of consistency and credibility impose requirements of round the clock conformity to its standards?

Upon every occasion of employee misconduct the church would face the prospect of having its decision reviewed. If the employee prevails, the church faces increased tax liability. This would chill the decision making process in the church or synod. Their choice would be: to act on their beliefs, terminating the employee for unseemly conduct and thereby facing increased taxes or the possibility of a hearing where their decision is second guessed, or in the alternative, to give up their beliefs and allow the disobedient employee to remain on the staff.

Similarily, the Secretary will necessarily have to determine the credibility of church or synod officials, not only as to whether a doctrinal position asserted is the actual reason for firing the employee, but whether the doctrinal interpretation asserted is really the correct doctrinal position of the church or synod. The situation here is similar to that in the *Catholic Bishop of Chicago v. NLRB*, 559 F. 2d 1112 (7th Cir. 1977) at 1125:

> We are unable to see how the Board can avoid becoming entangled in doctrinal matters if, for example, an unfair labor practice charge followed the dismissal of a teacher either for teaching a doctrine that has current favor with the public at large but is totally at odds with the tenets of the Roman Catholic faith, or for adopting a lifestyle acceptable to some, but con-

> trary to Catholic moral teachings. The Board in processing an unfair labor practice charge would necessarily have to concern itself with whether the real cause for discharge was that stated or whether this was merely a pretextual reason given to cover a discharge actually directed at union activity. The scope of this examination would necessarily include the validity as part of church doctrine of the reason given for discharge.

Likewise, where an employee is dismissed, say, for drinking wine, the inquiry might focus not only on whether the "misconduct" was the basis for the discharge but also on whether the teaching that drinking wine is "misconduct" is properly part of the moral teachings or doctrine of the church.

The subject statutes as interpreted by the United States Department of Labor and South Dakota impede or threaten the observance of the faith of operators of church schools in another way. It is clear under the statute that employment "in the employ of a church" is excluded from taxation. Therefore, to rule that teachers in the church schools are not excluded, while the church janitor, for instance, is exempt, is to rule that the teachers are not in the employ of the church. In effect, Caesar is asserting what *is* the church and what *is not*. Obviously as to churches, only ecclesiastical authority (i. e., only God through His Word, the Holy Bible, for Amici) can define what their church activities should be and should not be.

In this respect, Biblical mandates requiring an education of children are, for instance: Deuteronomy 6:6-7; Ephesians 6:4; Isaiah 54:13; Proverbs 1:7; Psalms 101:3; Psalms 78; Jeremiah 10:2; Proverbs 22:6; Proverbs 19: 27-28 and many others. The rearing and educating of children has been a responsibility imposed by the Christian faith and its Jewish predecessor in the Old Testament

days, for more than 5,000 years. For civil government now to say that in establishing Christian schools and paying teachers to work therein, the churches are not practicing their faith, or the schools are not part of the church, is to violently destroy the traditional and biblical definition of the church.

To impose the unemployment tax upon the church likewise violates the scriptural principle that the churches are not to pay taxes to civil government. The money in the church treasuries is regarded as God's money, held in trust, for uses consistent with His Word. To give God's money to civil government would be to violate the command of Jesus Christ, to "render therefore unto Caesar the things which be Caesar's, and unto God the things which be God's" (Luke 20:25). This the churches cannot do, regardless of the consequences, because of the biblical requirement that they obey God rather than men, when the law of man conflicts with the law of God (Acts 5:29). Imposition of the tax upon the churches, therefore, places them in the unenviable position of being told by government that they must do something that violates their sacred faith. In order to obey the subject statutes as interpreted by South Dakota it is the sincerely held beliefs of the Amici that they will have to violate God's Word. That alternative is not open to them. They will have no choice but to disobey the unbiblical requirement imposed by government.

Finally, in addition to the burdens described above, there will be the indirect financial burdens in the form of administrative and record keeping costs and the need to respond to state inquiries, state subpoenas to appear at hearings and so forth. SDCL §§ 61-3-2, 61-3-3, 61-3-7, and 61-7-1. Clearly South Dakota's interpretation of the subject statutes will result in burdens upon the free exercise of religion.

(B) The State has no compelling interest in imposing the statute as interpreted by South Dakota and the United States Department of Labor.

The constitutional rule, as stated by this Court in *Sherbert v. Verner,* 374 U. S. 398, 403 (1963), is that if the State places even an "incidental" burden on the freedom of religion, then such State action is in jeopardy of being stricken for violating religious liberty. In determining when state action is to be upheld in the face of a free exercise claim, the Court stated (at 403):

> "[I]t must be because [it] represents *no* infringement by the State of [the] constitutional rights of free exercise, or because any incidental burden on the free exercise of [Plaintiff's] religion may be justified by a 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate . . .' *NAACP v. Button,* 371 U. S. 415, 438." (Emphasis added.)

The application of the unemployment tax laws, as discussed above, imposes more than incidental burdens on Petitioners. Therefore, the rule enunciated in *Sherbert v. Verner, supra,* must be applied, i. e., the statute may be justified only if the State of South Dakota has a *compelling* interest in imposing the statutory requirements.

The "compelling interest" standard is not to be taken lightly. Rather, as proclaimed by this Court in *Wisconsin v. Yoder,* 406 U. S. 205 (1972) (at 215):

> The essence of all that has been said and written on the subject is that only those interests of the *highest* order and those not otherwise served can overbalance legitimate claims to the free exercise of religion. (emphasis added).

This was a reiteration of the *Sherbert v. Verner* standard which was phrased as follows in that case (at 406):

> It is basic that no showing merely of a rational relationship to some colorable state interest would

> suffice; in this highly sensitive constitutional area, [o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation.

South Dakota has no compelling state interest in imposing SDCL § 61-1-10.4 upon churches or the pastoral training academy operated by the synod. The apparent purpose of the statute is to protect employees from financial disaster when they lose their jobs. However, one exclusion from coverage is persons "in the employ of a church". If the state of South Dakota has no compelling interest in imposing unemployment compensation coverage for persons who are employed by churches as janitors or secretaries, why does the state have a compelling interest in imposing such coverage for persons who are church teachers?

Moreover, the very nature of the jobs held in Petitioner's schools show that they are not appropriate subjects of coverage. The "employees' are not mere job holders. Rather, these persons are "called" to their positions. The jobs are regarded by the churches, and the teachers themselves, as ministries or missions. The teachers are serving God in their occupations (P. A. 37-38). These persons are not different in their dedication from pastors or ministers of the church. For government to "protect" them in the event of unemployment is to entangle itself with the church and to intrude upon their religious beliefs.

Finally, should these teachers become unemployed, there are other forms of protection available to them.[4]

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4 Welfare and aid to families with dependent children are two examples, although many adherants of the fundamentalist faith would reject any form of government assistance, but would rather look to the church for charitable provision when needed.

The government is seeking to impose its power, where it is not wanted or needed. That it is neither wanted nor needed shows that the intrusion is interference with the free exercise of religion, and that the government has no compelling interest for doing so.

(C) The State must show that there are no other less intrusive ways of accomplishing any interest which it might have.

Language quoted above from *Wisconsin v. Yoder, supra* (at 215) bears repeating:

> The essence of all that has been said and written on the subject is that only those interests of the highest order and *those not otherwise served* can overbalance legitimate claims to the free exercise of religion. (emphasis added).

The italicized words point out another aspect of the compelling state interest test. First, where a government regulation interferes with religion, the government must show that it has a compelling state interest. Secondly, assuming that it can make such a showing, the government must show that its interest cannot be served, that its objectives cannot be accomplished, in any other manner that is less burdensome upon the free exercise of religion.

This requirement was imposed by this Court in earlier cases, including *Sherbert v. Verner, supra. Sherbert v. Verner* dealt with a Seventh Day Adventist who was unable to collect unemployment compensation benefits under the statutory scheme of South Carolina. Because she refused to work on Saturdays, the state commissioner had found that she was unavailable for work and disqualified for benefits according to that state's statute. The Court first noted that this ruling caused her to choose between observing the requirement of worship and rest on Saturday and thereby forfeiting benefits on the one hand, or

abandoning the precepts of her religion in order to accept work on the other hand. This requirement, the Court held, violated the free exercise of her religion. The Court then looked for some showing of a compelling state interest. The State offered the prospect of the filing of spurious claims, by persons who claimed falsely to be Sabbatarians. The Court, in dealing with this argument, noted that it is the burden of the state to show that there is no less burdensome means of serving its interest. It is not the burden of the free exercise claimant to prove that there is some less burdensome means available. Thus, the Court stated in *Sherbert v. Verner* (at 407):

> "For even if the possibility of spurious claims did threaten to dilute the fund and disrupt the scheduling of work, it would plainly be incumbent upon the appellees [the state] to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights."

Though it is certainly not a "compelling" interest, whatever interest the state has in imposing unemployment coverage on church employees can be served by other means which are less burdensome. While Amici are not required to make any such showing, nevertheless, one less burdensome alternative will be mentioned.

A program providing for unemployment compensation for church employees, including school teachers, could be voluntary. Employers in other realms often participate voluntarily in insurance programs or benefit programs where their employees want it. Thus, if participation by church employers in a program of unemployment compensation were voluntary, whereby churches could choose to participate or not participate, those whose convictions are not violated by such a program, and who desire to do so, could participate. Those such as Petition-

ers or Amici whose religious convictions would be violated by the program could choose to stay out of it. Prospective employees in church schools who do not share the convictions of the Petitioners or Amici could seek employment at churches where such benefits are available. Under this alternative churches which have a deeply held religious conviction that they cannot participate in such a program would not be forced to do so, yet there would be such program benefits available for those who want them.

(D) South Dakota's interpretation of the subject statutes would also result in a violation of the establishment clause of the First Amendment of the United States Constitution.

There are two basic aspects to establishment clause limitations on government. One concerns whether, as a result of the statutory interpretation, government will become excessively entangled in affairs of the church. This was explained in *Lemon v. Kurtzman*, 403 U. S. 602 (1971). That case concerned statutes from Pennsylvania and Rhode Island which authorized financial aid to parochial schools. The Court, in holding the statutes unconstitutional observed, at 612-613:

> The language of the Religion Clauses of the First Amendment is at best opaque, particularly when compared with other portions of the Amendment. Its authors did not simply prohibit the establishment of a state church or a state religion, an area history shows they regarded as very important and fraught with great dangers. Instead they commanded that there should be "no law *respecting* an establishment of religion." A law may be one "respecting" the forbidden objective while falling short of its total realization. A law "respecting" the proscribed result, that is, the establishment of religion, is not always easily identifiable as one violative of the Clause. A given law might not *establish* a state religion but neverthe-

less be one "respecting" that end in the sense of being a step that could lead to such establishment and hence offend the First Amendment.

In the absence of precisely stated constitutional prohibitions, we must draw lines with reference to the three main evils against which the Establishment Clause was intended to afford protection: "sponsorship, financial support, and active involvement of the sovereign in religious activity." *Walz v. Tax Commission,* 397 U. S. 664, 668, 25 L. Ed. 2d 697, 701, 90 S. Ct. 1409 (1970).

Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, *Board of Education v. Allen,* 392 U. S. 236, 243, 20 L. Ed. 2d 1060, 1065, 88 S. Ct. 1923 (1968); finally, the statute must not foster "an excessive government entanglement with religion." *Walz, supra* at 674, 25 L. Ed. 2d at 704. (Emphasis added.)

The continuous contact between the church and state as outlined in another portion of this brief will constitute excessive entanglement. Not only will there be frequent contact, inspections of records, response to subpoenas and attendance at hearings, but there is the very real probability that the state Secretary of Labor will be required to interpret church doctrine in the face of conflicting testimony. He will be called upon to pass on the validity and credibility of testimony of church officials in deciding doctrinal questions as related to "misconduct" or quitting for a "good cause". He may be called upon to examine the day to day classroom activities of a teacher to ascertain what portions of his or her time is devoted to religious and non-religious pursuits respectively. SDCL § 61-1-31. Moreover, each church will have an "account"

with the state whereby its performance in hiring and firing employees will be subject to continuous consequences in terms of increased liability for unemployment tax payments. This is excessive entanglement in a free society where church and state are supposed to be separated by a wall of protection.

Many of the recent court decisions have focused on the entanglement question. In *Grace Lutheran Church v. North Dakota Employment Security Bureau,* 294 N. W. 2d 767 (N. D. 1980) the court first held that under the statutory language, no coverage could be imposed upon school teachers who taught in Grace Lutheran Church's school. The court went on to discuss the constitutional issues. It noted, at p. 773, that the United States Department of Labor had advised all state agencies that as to an employee who performs both non-exempt and exempt services during an employment period, if more than one-half of his services were non-exempt, then all of his services would be treated as non-exempt for unemployment taxation purposes. The converse was also true, i. e., if more than one-half of the employee's services were exempt, then all of his services would be treated as exempt for unemployment tax purposes. As the Supreme Court of North Dakota observed, at 774, this would put the state agency to the task of conducting "extensive audits in order to determine whether or not the employee has spent more than one-half of his time on purely religious activity." The Court concluded that such inspection and inquiry by the state would also require extensive records and would constitute "pervasive monitoring of these church agencies by the secular authorities". *Grace Lutheran Church v. North Dakota Employment Security Bureau, supra,* at 774. A similar observation was made by the Court in *Grace Breth-*

ren Church v. California, No. 79-93 MRP (D. C. Cal. Sept. 21, 1979) (granting preliminary injunction) wherein the Court observed that "controversies will arise, for example, as to whether in a world history class the teacher spends more than one-half of any given session teaching purely "religious" or purely "secular" history. . . ."

Both the Supreme Court of North Dakota and the Federal District Court for the Central District of California were also concerned that decisions to fire or lay off employees would be reviewed by state authorities. As noted in *Grace Lutheran Church v. North Dakota Employment Security Bureau, supra* at 774:

> Thus, disputes may arise where the church dismisses an employee for failure to teach according to the religious tenet of the church. The employee may contend that the real reason he or she was dismissed was due to budgetary concerns. In such event, the state agency would have to determine whether or not the teacher did, in fact, fail to adhere to the religious tenets of the church. This is the type of entanglement prohibited by the First Amendment to the Constitution.

Amici would point out that regardless of the outcome, "the very process of such inquiry" has a chilling effect and is the type of hindrance which also violates the free exercise clause. *NLRB v. Catholic Bishop of Chicago,* 440 U. S. 490, 502 (1979).

Furthermore, as alluded to before, the statute here states that a "church" employee is exempt. For the state to impose the tax upon church school employees is to assert that the church school is not church or that the purpose of the synod's pastoral training academy is not "religious". In so doing, the State is defining the church. It is saying what is religious and what is not religious. This violates the establishment clause because the State

purports to be excluding from the definition of the term "religious" certain activities which have historically been considered religious within the Judeo-Christian culture. It is thereby approving or establishing religions which adhere to the state concept and which depart from deeply rooted religious tenets.

Finally, *Walz v. Tax Commission,* 397 U. S. 664 (1969) must be considered. There a taxpayer brought suit to enjoin the New York City Tax Commission from granting property tax exemptions to religions organizations. The Court, in examining the concept of a tax exemption noted, at 676, that it "creates only a minimal and remote involvement between church and state and far less than taxation of churches." In *Walz* the court further observed, at 674:

> Elimination of exemption would tend to expand the involvement of government by giving rise to tax valuation of church property, tax liens, tax foreclosures, and the direct confrontations and conflicts that follow in the train of those legal processes.

The prospect of church state confrontations over non-payment of taxes is a forbidding presence in this case. Amici churches are involved in this matter only because their religious convictions *require* that they not pay taxes to Caesar. The church's money is dedicated to uses permitted or required in the Bible. It is regarded as God's money. The churches recognize the concept, espoused by this Court in *McCulloch v. Maryland,* 17 U. S. 316 (1819) "that the power to tax involves the power to destroy". If South Dakota can tax the churches or synods in this state, it can destroy them, and this will most surely occur where the state seeks to impose taxes upon churches which, in obedience to God, resist. The logical consequence will be that which was described in *Walz v. Tax Commission,*

that is, tax liens, foreclosures, and sales of church property upon the courthouse steps. The result will be ominous. It will be the fearful concept of state officers selling church property, shutting down the church, and stopping the free exercise of religion first in South Dakota, then all of the United States of America.

CONCLUSION

The conclusion is inescapable that (1) 26 U. S. C. § 3309 and SDCL § 61-1-10.4 not require St. Martin Evangelical Lutheran Church or the Wisconsin Evangelical Lutheran Synod to contribute to the Unemployment Tax fund for coverage for church or synod employees, i. e., persons employed in the church school or persons employed in religious purpose church organization; (2) if the statutes are so interpreted, they will be in violation of the free exercise clause of the first amendment and the establishment clause of the first amendment. Amici churches respectfully submit that this Court should rule that under the subject statutes persons who are "in the employ of a church" or in the employ of a religious purpose church organization be they employed as teachers in a Christian school, pastors, church secretaries, or in any other capacity, are exempt from the requirement that unemployment coverage be provided for them. This case should be remanded to the Supreme Court of South Dakota whose decision should be reversed, with instructions to proceed accordingly.

Respectfully submitted,
GIBBS & CRAZE

by.....

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Motion of Grace Baptist Temple, Prattville, Alabama and the Alabama Christian Education Association, Inc. for Leave to File Brief as Amici Curiae and Brief of Grace Baptist Temple, Prattville, Alabama and the Alabama Christian Education Association, Inc. as Amici Curiae in Support of Petitioners were served by depositing them in a United States post office or mailbox, with first-class postage prepaid, this 15th day of December, 1980, addressed to Edward Thomas Schilling, Esq., 757 North Broadway, Suite 500, Milwaukee, Wisconsin 53202, counsel for Petitioners and Judith A. Atkinson, Esq., Assistant Attorney General, Office of Attorney General, State Capitol, Pierre, South Dakota 57501, counsel for Respondent.

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David C. Gibbs, Jr.